(1)

No. __-___

Supreme Court, U.S.
FILED
01-28 JUL 03 2001

IN THE

Supreme Court of the United States

WALTER R. KELLY, Superintendent,
Great Meadow Correctional Facility,

Petitioner,

—v.—

CASIM NOBLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN F. LUNGEN*
District Attorney, Sullivan County

BONNIE M. MITZNER
Assistant District Attorney

JOHN M. CASTELLANO
Of Counsel

Sullivan County District Attorney's Office
County Courthouse
Monticello, New York 12701
(845) 794-3344

* *Counsel of Record for the Petitioner*

July 3, 2001

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QUESTION PRESENTED

Is a finding of wilful non-compliance necessary under the Sixth Amendment in order to preclude the testimony of a defense witness for a defendant's failure to comply with pre-trial discovery obligations?

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The memorandum decision of the United States District Court for the Eastern District of New York (Sand, D.J.) is reported at 89 F.Supp.2d. 443 (S.D.N.Y. 2000). It is reprinted in the appendix at pp. 15a-58a.

The decision of the New York State Court of Appeals denying the state prisoner's application for leave to appeal to that court from the decision of the Appellate Division, Third Department is reported at 84 N.Y.2d 1036, 623 N.Y.S.2d 192, 647 N.E.2d 464 (1995). The decision of the Appellate Division, Third Department, unanimously affirming the judgment of conviction is reported at 209 A.D.2d 735, 618 N.Y.S.2d 123 (2d Dept. 1994) and reprinted in the appendix at pp. 59a-61a.

JURISDICTION

This petition for a writ of *habeas corpus* was filed in the Southern District of New York invoking federal jurisdiction under 28 U.S.C. § 2254. On March 12, 1998, Southern District Judge Leonard B. Sand granted the petition and ordered the release of the petitioner if the state failed to re-try him within 90 days of the date of the order. The court stayed the effect of the order granting the writ for the state to appeal.

On April 5, 2001, the Second Circuit, which acquired jurisdiction under 28 U.S.C. sections 1291 and 2253, entered a judgment and opinion affirming the District Court's issuance of the writ. Petitioner's Appendix at 15a (hereinafter "PA").

This petition for certiorari is filed within ninety days of that date, and is therefore timely. Sup. Ct. R. 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .

New York Criminal Procedure Law § 250.20:

> Section 250.20 Notice of alibi
>
> 1. At any time, not more than twenty days after arraignment, the people may serve upon the defendant or his counsel, and file a copy thereof with the court, a demand that if the defendant intends to offer a trial defense that at the time of the commission of the crime charged he was at some place or places other than the scene of the crime, and to call witnesses in support of such defense, he must, within eight days of service of such demand, serve upon the people, and file a copy thereof with the court, a "notice of alibi," reciting (a) the place or places where the defendant claims to have been at the time in question, and (b) the names, the residential addresses, the places of employment and the addresses thereof of every such alibi witness upon whom he intends to rely. For good cause shown, the court may extend the period for

service of the notice.

* * *

3. If at the trial the defendant calls such an alibi witness without having served the demanded notice of alibi, or if having served such a notice he calls a witness not specified therein, the court may exclude any testimony of such witness relating to the alibi defense. The court may in its discretion receive such testimony, but before doing so, it must, upon application of the people, grant an adjournment not in excess of three days.

STATEMENT OF THE CASE

On the evening of October 26, 1989, Casim Noble shot 17-year-old Dwight Usher outside a bar in Kiamesha, New York. Usher was sitting in a car when Noble and two others walked down a nearby hill, approached the car, and asked Usher to come out. When Usher stood up, Noble pulled a gun and fired five shots at him. Four of these shots struck Usher, penetrating his thigh, elbow, groin, and upper chest.

Usher was taken by friends to the local sheriff's office, where a deputy sheriff called an ambulance. Before being taken to the hospital, Usher told the deputy sheriff that he had been shot by Casim, whom he knew and recognized. Troy Leibert, who was standing 30 feet away at the time of the shooting, also identified Noble. He had seen Noble on previous occasions at the bar and knew him as Casim. Usher underwent several operations and survived the attack, suffering numerous gunshot wounds and retaining two bullets inside his body.

State Court Proceedings

Noble was charged in New York State County Court, Sullivan County, with Attempted Murder in the Second Degree, Assault in the First Degree, Criminal Use of a Firearm in the First Degree, and Criminal Possession of a Weapon in the Second Degree. At the trial of these charges, the prosecution presented the testimony of Dwight Usher and Troy Leibert, both of whom identified Noble as the shooter.

After the prosecution rested, Noble attempted to call Steven Yamagata, who, counsel told the court, would testify that Noble was inside the bar at the time of the shooting and therefore could not have committed the assault (PA 65a). The prosecutor objected, arguing that counsel had failed to comply with the discovery provisions of New York Criminal Procedure Law section 250.20 (PA 66a). Under those provisions, once a prosecutor files a proper demand, a defendant who intends to introduce testimony that he was somewhere other than at the scene of the crime must file a notice containing the names and addresses of the relevant witnesses. Under this section, the defendant must file the notice within eight days of the prosecutor's demand. The statute authorizes preclusion of the proffered testimony for failure to comply and requires a three-day adjournment if the court admits the testimony. The prosecutor noted that he had served a demand approximately one and one-half years before trial and that Noble had never supplied the required notice (PA 66a).

Defense counsel argued that he was not required to give the statutory notice. After he explained that the testimony would place Noble inside the bar, the court asked, "Why isn't that an alibi?" (PA 65a). Counsel argued, "Whether it's outside or inside, it's 20 yards away. I'm not putting him in New York City or anything" (PA 66a). Counsel told the prosecutor, "You

can have your three days" (PA 67a). The prosecutor immediately disputed defense counsel's claim, responding that even if "apartment A and Apartment B are in the same location" and only the thickness of a wall apart, a defendant who alleged he was in a different apartment than the one in which the crime took place would be raising an alibi defense (PA 66a).[1]

The trial court rejected defense counsel's argument. The court noted that the witness's testimony would place Noble "behind a door and in a building, and the action occurred or is alleged to have occurred out in the parking lot" (PA 66a) The court therefore precluded Yamagata's testimony to the extent that it would place Noble inside the bar at the time of the crime.[2]

The defense nevertheless was allowed to present the testimony of two witnesses who were outside the bar, Melvin Walker and Ralphalena Andrews, who testified that they saw the assailants and that Noble was not one of them. Both witnesses had previously given contrary statements to the sheriff's office

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[1] Counsel also argued that he properly declined to serve notice because the indictment stated that the crime occurred in the "vicinity"of the bar, but the prosecutor noted, without contradiction, that the bill of particulars and the motion practice indicated that the crime occurred in front of the bar (PA 67a). The court subsequently noted that the prosecutor's response to defense discovery requests indicated the scene of the crime was "in front of the Around the Corner Bar" (PA 68a, 69a-70a).

[2] Counsel also proffered Yamagata's testimony on the issue of whether a fight occurred in the bar earlier on the night of the crime (PA 70a). At the time of trial, Yamagata was in custody and represented on pending drug indictments by the same attorney who represented Noble. These charges were not pending at the time of the incident in this case.

identifying Noble as one of the three men who had committed the crime.

Noble was convicted on all counts. He was sentenced to concurrent terms totaling 12½ to 25 years in jail.

Noble appealed to the New York State Appellate Division, Third Department, arguing, among other things, that the court improperly precluded Yamagata's testimony and that trial counsel was ineffective. The appellate court affirmed the conviction. *People v. Noble*, 209 A.D.2d 735, 618 N.Y.S.2d 123 (3d Dept. 1994). It declined to rule on the preclusion issue, finding any error in this regard harmless, and rejected the argument that counsel was ineffective. On January 30, 1995, a Judge of the New York Court of Appeals denied leave to appeal. *People v. Noble*, 84 N.Y.2d 1036, 623 N.Y.S.2d 192, 647 N.E.2d 464 (1995) (Bellacosa, J).

Federal Court Proceedings

Noble subsequently brought a proceeding for a writ of habeas corpus in federal court. In the petition, Noble argued that the trial court violated the Sixth Amendment's Compulsory Process Clause by precluding Yamagata's testimony and that counsel was ineffective for several reasons, including failing to file the required notice. The state responded that the petition was untimely, that Noble's federal constitutional claims were unexhausted, that the trial court properly precluded Yamagata's testimony, and that counsel was effective.

The District Court granted the petition on February 28, 2000. *Noble v. Kelly*, 89 F.Supp.2d 443 (S.D.N.Y. 2000) (Sand, D.J.). After holding that the petition was timely filed and Noble had properly exhausted his claims, the District Court

concluded that the trial court's preclusion of Yamagata's testimony violated the Compulsory Process Clause. The Court analyzed this Court's decision in *Taylor v. Illinois*, 484 U.S. 400 (1988) and held that the trial court's failure to make a finding of wilfulness in this case, as was present in *Taylor*, rendered the court's action constitutionally invalid. The court also found that the error was not harmless. The court, accordingly, issued a conditional writ of habeas corpus providing that Noble be released within 90 days if not re-tried by the state.[3]

The state appealed to the Second Circuit. With regard to the preclusion issue, the state argued that a finding of wilfulness was not a pre-requisite under the Sixth Amendment to precluding the testimony of a witness for the failure to comply with discovery obligations. Brief for Appellant, 2d Cir. No. 00-2154 at 15-18. The state also argued that counsel's wilfulness was established by the fact that counsel had ample notice of the place of alleged commission of the crime outside the bar, that counsel had long had access to Yamagata because counsel had represented Yamagata for months on his pending drug case, and that counsel's colloquy demonstrated that he was experienced and knew full well the scope of the alibi notice statute. *Id.* at 18-21. The state also noted that the trial court could have legitimate concerns over the testimony because it was offered at the eleventh hour, and the alleged alibi witness and Noble spent several months together prior to trial in the Sullivan County Jail. *Id.* at 20 n.3,d 28. The state also argued that an adjournment would have done little or nothing to avoid

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[3] The court also held that counsel had been ineffective for the sole reason that he had failed to file a notice of alibi. Although the court had found in assessing the Compulsory Process claim that counsel possessed a good faith belief that he did not have to file a notice, the court nevertheless concluded that counsel's decision not to file the notice constituted ineffective assistance of counsel.

prejudice because it would not have allowed the prosecutor to interview Yamagata, who had pending indictments and was represented by Noble's attorney in those cases. *Id.* at 21-23. Finally, the state argued that any error was harmless. *Id.* at 24-31.

Noble argued that the District Court correctly determined that the trial court had precluded Yamagata's testimony in violation of the Compulsory Process Clause. Noble acknowledged that the application of *Taylor v. Illinois* required a sensitive weighing of the right to present a defense against countervailing public interests and that the preclusion sanction had to be judged on a case-by-case basis. *See* Brief for Appellee, 2d Cir. No. 00-2154, at 20-21. He then argued that counsel had not acted wilfully but acted out of an honest belief that he did not have to file the notice, and that the trial court was required to grant a short adjournment rather than preclude the testimony. *Id.* at 25-27. Noble also argued that the trial court's decision was, under the deferential standard of AEDPA as explained in *Williams v. Taylor*, 120 S.Ct. 1495 (2000), "contrary to" and "an unreasonable application of" *Taylor v. Illinois.* Finally, Noble asserted that the trial court's error was not harmless.

On April 5, 2001, the Second Circuit affirmed the District Court's judgment granting the petition. *Noble v. Kelly*, 246 F.3d 93 (2d Cir. 2001). The Second Circuit held that the trial court's preclusion of the testimony of the witness violated the Compulsory Process Clause absent a finding that counsel acted wilfully in failing to file the alibi notice. Going beyond the position taken by Noble that *Taylor v. Illinois* required a sensitive weighing of countervailing interests in each individual case, the Second Circuit promulgated a rule requiring a finding of wilfulness as a pre-requisite to preclusion in every case in which prejudice could be "minimized with relative ease" through

other means. 246 F.3d at 100 and n. 3 ("we . . . conclude that where prejudice to the prosecution can be minimized with relative ease, a trial court's exclusion of alibi testimony *must be supported by a finding of some degree of wilfulness* in defense counsel's violation of the applicable discovery rules") (emphasis added). The court then declined to return the case to the District Court for a finding on the issue of whether counsel acted wilfully, and instead determined, based on the record before it, that counsel had not acted in bad faith and that defendant's Sixth Amendment rights had therefore been violated. *Id.* at 100-101. The Second Circuit also held that it would come to the same conclusion whether or not it used AEDPA's deferential standard of review, the applicability of which the court declined to consider. *Id.* at 98. Finally, the court ruled that the error was not harmless and affirmed issuance of the writ on this ground.[4] *Id.* at 101.

Judge Jacobs wrote separately, concurring in the majority opinion as to all points but dissenting on the issue of the appropriate remedy. *Id.* at 102-03. Judge Jacobs favored a remand to the District Court for a hearing on the issue of wilfulness because the record was sufficiently ambiguous to warrant it. *Id.* at 102. Judge Jacobs noted that defense counsel was an experienced criminal defense lawyer who undoubtedly knew that Yamagata's testimony was of a kind that would be most valuable if the government was surprised and lacked an opportunity to prepare for it. *Id.* He also noted that Noble and Yamagata had the same attorney and that they were "friends from prison days." *Id.* He believed that at a hearing a court

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[4] In light of its affirmance on the Compulsory Process ground, the Second Circuit did not consider the District Court's alternative basis for issuing the writ that counsel was ineffective. 246 F.3d at 101 n. 4. The court also held that the District Court had correctly held that the petition was timely filed. *Id.* at 97-98.

might find that Yamagata's name was withheld deliberately, at least until counsel concluded that Yamagata could no longer effectively be interviewed by the prosecution because counsel had come to represent both men. Finally, Judge Jacobs, citing this Court's language in *Taylor* regarding the ease with which an eleventh-hour alibi can be concocted, urged that a new trial not be mandated unless it was clear that constitutional error had occurred.

Petitioner now seeks a writ of certiorari from this Court to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

REASONS FOR GRANTING THE WRIT

Summary of Argument

In the thirteen years since this Court's decision in *Taylor v. Illinois*, 484 U.S. 400 (1988), lower courts have divided sharply on the question of whether a defendant's failure to comply with discovery obligations can result in preclusion of a defense witness in the absence of a finding that the defendant or his attorney acted wilfully to gain a tactical advantage. Some courts have concluded from the *Taylor* Court's statement that preclusion would be "appropriate" in such circumstances that wilfulness is a pre-requisite to preclusion in all, or a specifically defined sub-category, of cases. Other courts have read *Taylor* to impose a weighing or balancing test, leaving a case-by-case assessment of the factors in the discretion of the trial court in the first instance, subject to re-evaluation on appeal. This case presents the Court with an opportunity to resolve this long-standing controversy and provide guidance to lower courts that have the difficult task of sorting through the divergent lines of authority and making a prompt decision that will withstand later

scrutiny.

The critical need for resolution of this issue is demonstrated both by the depth of the division of authority and the nationwide breadth of the issue. In the federal courts, the split of authority divides the Eighth, Ninth, and now Second Circuit Courts of Appeals, which have required a showing of wilfulness as a pre-requisite to preclusion in some or all cases, from the First, Sixth, Seventh, Tenth, and District of Columbia Circuits, which have imposed a multi-factor test in lieu of any rigid rules. Indeed, at least three federal circuit courts of appeals have expressly noted the split of authority among the circuits on this issue. Nor has the controversy been confined to the federal courts. The same division is reflected among the state courts of last resort to have considered the issue, which continue to issue decisions falling on both sides of the question in the absence of guidance from this Court.

Moreover, these cases only begin to suggest the potential reach of this issue. Over forty states now have notice-of-alibi rules similar to the New York rule at issue here. Almost all of these rule expressly authorize, and some even command, preclusion upon a defendant's failure to comply with the rules without adequate cause, and none of the rules expressly require a showing of wilfulness as a pre-requisite to preclusion in any category of cases. In addition, the Federal Rules of Criminal Procedure, which of course govern federal prosecutions nationwide, also contain notice of alibi provisions almost identical to the New York rule. And these state and federal notice of alibi rules are but one species of reciprocal discovery provisions, which impose many different discovery obligations on defendants and exist in some form in all states.

Furthermore, the Second Circuit rule and those of other circuits requiring a showing of wilfulness cannot be squared

with this Court's decision in *Taylor*. While this Court held that preclusion would be appropriate in cases of wilful non-compliance, it by no means made a showing of wilfulness a pre-requisite to preclusion. To the contrary, the Court set out a test under which many factors would "weigh in the balance," and cited to a lower court decision applying a balancing test as an example of the careful assessment of the many relevant factors. *Id.* at 415 n.19. The Second Circuit categorical rule is inconsistent with this test and fails to require, or even on its face permit, inquiry into many relevant considerations, including some specifically identified in *Taylor*.

Finally, there is a pressing need for resolution of this issue for both defendants and prosecutors. If, in fact, a showing of wilfulness is required under the Sixth Amendment, then many jurisdictions are depriving defendants, and juries, of testimony relevant to the defense without adequate cause. If wilfulness is not required, however, then many convictions are needlessly being overturned, even though the trial court, which is in the best position to evaluate the factors at issue, has made a correct assessment and justly precluded the testimony. Because the current indecision in the state of the law benefits no one and because the question has such far-reaching consequences, the issue warrants this Court's review.

I. As Has Been Noted by at Least Three Federal Circuit Courts of Appeals, There Is a Split of Authority among the Circuits and among State Courts of Last Resort over Whether a Finding of Wilfulness Is Necessary to Preclude the Testimony of a Defense Witness for a Discovery Violation.

No fewer than eight federal circuit courts have spoken on the issue of whether a finding of wilfulness is required in order to preclude defense testimony for the failure to comply

with reciprocal discovery provisions. These courts have, however, been unable to agree on an answer. Indeed, at least three federal circuit courts have expressly noted the split of authority. Because the issue presents an increasingly unsettled issue of law that can only be resolved by this Court, it is worthy of this Court's review.

The majority of federal circuit court decisions addressing the issue adopt a balancing test, based on the considerations outlined in *Taylor*, rather than a "bad faith" or wilfulness requirement. For example, in *United States v. Johnson*, 970 F.2d 907, 910-12 (D.C. Cir. 1992), the District of Columbia Circuit upheld the preclusion of a defense witness for failure to comply with the alibi notice provisions of Federal Rule of Criminal Procedure 12.1, even though the District Court had found that defense counsel had not acted in bad faith. The D.C. Circuit, noting the split of authority on this issue, specifically declined to adopt a bad-faith requirement for preclusion, holding that such a requirement "would be inconsistent with the *Taylor* Court's reference to trial court discretion and its extended discussion of the relevant factors." *Id.* at 911. The court observed that, while the *Taylor* court noted that the discovery violation in that case was wilful and blatant, "the opinion certainly did not say that such findings were essential." *Id.* The court also rejected the defendant's argument that the trial court should have granted an adjournment that could have avoided prejudice, holding that this less restrictive alternative was not mandated even in the absence of a finding of wilfulness.

Similarly, the Seventh Circuit in *Tyson v. Trigg*, 50 F.3d 436, 445 (7th Cir. 1995), *cert. denied*, 516 U.S. 1041 (1996), upheld a state conviction despite the preclusion of a defense witness for a violation of state reciprocal discovery order and despite the fact that it determined that the violation was not willful. Once again citing the split of authority among the

Circuit Courts on this issue and noting that *Taylor* left the issue open, the Court held, "We do not think a hard and fast rule to govern [such cases] is feasible or desirable." *Id.* The court continued, "Given the competing considerations identified above, the highly situation-specific character of the judgment that the trial judge is called upon to make in the hurly-burly of trial, . . . we do not consider it the proper office of a federal court . . . to second guess a discovery ruling unless we are convinced, in the circumstances, that it is unreasonable." *Id.* The court then reiterated that the test to be applied was "reasonableness in the circumstances." *Id.* at 446.

Likewise, the Tenth Circuit has upheld the preclusion of defense witnesses for the failure to comply with discovery obligations absent a showing of wilfulness, adopting a multi-factor balancing test instead of a rigid rule. For example, in *United States v. Russell*, 109 F.3d 1503 (10th Cir.), *cert. denied*, 521 U.S. 1126 (1997), the Tenth Circuit upheld the District Court's preclusion of a defense witness where counsel was "at least negligent" in his conduct by applying a multi-factor balancing test that it had derived from *Taylor* in a previous case. In *United States v. Pearson*, 159 F.3d 480, 484 (10th Cir. 1998), *cert. denied*, 530 U.S. 1268 (2000), the Tenth Circuit upheld, under an abuse-of-discretion standard, the preclusion of a witness for the failure to comply with Federal Rule of Criminal Procedure 12.1, even though counsel had acted diligently and the defendant was described as acting with "negligence." *Id.* at 483-84. *See also United States v. Davis*, 40 F.3d 1069 (10th Cir. 1994) (upholding exclusion of evidence for failure to comply with federal alibi-notice rule even though counsel did not know of alibi witness name until one week before trial), *cert. denied*, 514 U.S. 1018 (1995). And, in a case decided after the District Court's order in this case, the Tenth Circuit upheld a state court's preclusion of a defense witness for failing to comply with alibi notice rules even though counsel's conduct

was inadvertent. *Watley v. Williams*, 218 F.3d 1156, 1159-60 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 809 (2001). The Tenth Circuit, applying the AEDPA deferential standard that the Second Circuit purported to apply here, held that the state court's application of its alibi notice rule to inadvertent conduct was reasonable under *Taylor v. Illinois*. *Id.*

And the First Circuit too has applied a balancing test to determine the constitutional validity of preclusion for a defendant's failure to give proper alibi notice, rather than setting down any rigid rule requiring wilfulness. For example, in *United States v. Levy Cordero*, 67 F.3d 1002, 1013-15 (1st Cir. 1995), *modified*, 1995 U.S. App. LEXIS 31825, *cert. denied sub nom Forty-Estremera v. United States*, 517 U.S. 1162 (1996), the Court outlined the factors to be considered "in the balance," and examined these factors in detail in assessing the constitutional validity of the District Court's preclusion of alibi evidence for failure to comply with a District Court order. *See also United States v. Portela*, 167 F.2d 687 (1st Cir. 1999) (noting split of authority and stating, "We, however, have never held that willfulness is the sole predicate of an exclusionary sanction"); *Chappee v. Vose*, 843 F.2d 25, 29 (1st Cir. 1988) (stating that *Taylor* declined to cast a mechanical standard; cited with approval in *Portela*).

Similarly, the Sixth Circuit has expressly adopted a balancing test, requiring a weighing of factors outlined in *Taylor*, rather than a rule requiring a showing of wilfulness in any set category of cases. In *United States v. Hamilton*, 128 F.3d 996 (6th Cir. 1997), in upholding the District Court's preclusion of defense evidence for the failure to comply with discovery obligations, the Sixth Circuit observed, "The majority of courts find that *Taylor* requires a balancing test, weighing the defendant's right to present evidence in his defense against countervailing public interests, such as the court's need to

preserve the integrity of the trial process." *Id.* at 1002 (citations omitted). The circuit court went on to weigh the *Taylor* factors, citing the First Circuit's decision in *Chappee v. Vose*, 843 F.2d at 29-30, for the proposition that an appellate court may "reweigh the elements of the *Taylor* test." *Id.*

Thus, at least five federal circuit courts have adopted the position that *Taylor* requires a weighing of factors in each individual case rather than a rigid rule requiring a showing of wilfulness in all cases or any set category of cases. Several circuit courts, however, have come to a different conclusion. In *United States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991), for example, the Ninth Circuit applied a rule purportedly derived from *Taylor* that would uphold "the drastic remedy of excluding a witness only in cases involving 'wilful and blatant discovery violations." *Id.* at 937 (quoting *Taylor*). The court concluded that no wilful or blatant violation of the discovery rules occurred in the case before it, and it held that the District Court violated the defendant's Sixth Amendment rights when it excluded a witness for a failure to comply with Federal Rule of Criminal Procedure 16, which requires defense disclosure of expert witnesses. *But see People of the Territory of Guam v. Palomo*, 937 F.2d 368, 374 (9th Cir. 1994) ("In *Peters*, we concluded that it was improper to exclude an expert witness *in the absence of an underlying discovery violation.*") (emphasis added). Similarly, in *Anderson v. Groose*, 106 F.3d 242 (8th Cir.), *cert. denied*, 521 U.S. 1108 (1997), the Eighth Circuit applied a rule that it derived from *Taylor* requiring a showing of wilfulness, and issued a writ of habeas corpus because "[n]o court in this case has found, nor is there anything in the record to indicate, that trial counsel was wilful in her noncompliance with the discovery rules." *Id.* at 246.

This same split of authority is reflected in the state courts of last resort that have considered the issue. A majority

of these courts appear to have adopted a balancing test in evaluating the propriety of exclusion for the failure to comply with defense discovery obligations, rather than a requirement of wilfulness. *See Lawson v. State*, 994 P.2d 943, 946-47 (Wy. 2000) (applying balancing test and reviewing for an abuse of discretion); *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061, 1071-71 (1998) (applying four-factor balancing test derived from *Taylor* to uphold preclusion), *cert. denied*, 525 U.S. 1157 (1999); *Commonwealth v. Durning*, 406 Mass. 485, 548 N.E.2d 1242, 1249 (Mass. 1990) (continuing use of pre-*Taylor* five-factor balancing test to uphold preclusion); *People v. Pronovost*, 773 P.2d 555, 557-60 (Colo. 1989) (applying five-factor balancing test); *State v. Edwards*, 153 Vt. 649, 569 A.2d 1075 (1989) (applying balancing test derived from *Taylor*); *McCarty v. State*, 763 P.2d 360, 362-64 (N.M. 1988) (applying multi-factor balancing test); *see also State v. Cromlish*, 2001 N.H. LEXIS 72, *5-6, *12-17 (N.H. April 13, 2001) (applying multi-factor balancing test under state constitution, although noting that no difference between state and federal law exists on this issue); *People v. Morgan*, 142 Ill.2d 410, 568 N.E.2d 755 (1991) (upholding exclusion in discretion of trial judge without finding of wilfulness), *rev'd on other grounds*, 504 U.S. 719 (1992). And, of course, New York has never required a finding of wilfulness as a pre-requisite to preclusion for the failure to comply with a discovery violation. *See, e.g., People v. Almonor*, 93 N.Y.2d 571, 693 N.Y.S.2d 571, 715 N.E.2d 1054 (1999); *People v. Castro*, 263 A.D.2d 373, 695 N.Y.S.2d 306 (1st Dept. 1999); *People v. Houston*, 220 A.D.2d 451, 631 N.Y.S.2d 930 (2d Dept. 1995); *People v. Morris*, 220 A.D.2d 808, 632 N.Y.S.2d 231 (3d Dept. 1995); *People v. Marshall*, 170 A.D.2d 463, 565 N.Y.S.2d 551 (2d Dept. 1991).

Other state courts of last resort have, however, interpreted *Taylor* to require a finding of wilfulness in some or all cases. *See, e.g., State v. Snodgrass*, 207 W. Va. 631, 535

S.E.2d 475, 478 (2000) (stating that preclusion allowed where violation of rule was wilful and reversing because of absence of evidence of wilfulness); *White v. State*, 973 P.2d 306, 311 (Ok. 1998) (stating that excluding *material* defense witness is only appropriate when the discovery violation is wilful and motivated by desire to obtain a tactical advantage); *Skaggs v. State*, 676 So.2d 897, 903 (Miss. 1996) (stating that radical sanction of preclusion reserved for cases in which defendant "participates significantly in some deliberate, cynical scheme to obtain a substantial tactical advantage"); *State v. Begin*, 652 A.2d 102 (Me. 1995) (noting that other jurisdictions allowed exclusion only as a sanction for a willful violation of discovery rules and finding no such wilful violation in the case before it).

The Second Circuit has now become the most recent entrant in this controversy, rejecting any case-by-case balancing of the factors identified in *Taylor* in favor of a rule that makes a showing of wilfulness a pre-requisite to preclusion, at least in a substantial, specifically-defined category of cases. Indeed, the court made clear that it would require a finding of wilfulness as a predicate for preclusion whenever prejudice to the prosecution could be "minimized" by any other means. By imposing a specific requirement of wilful non-compliance and rejecting a case specified balancing test, the Second Circuit directly aligned itself against the decisions of the First, Sixth, Seventh, Tenth, and D.C. Circuits. Thus, although the Second Circuit arrived at a somewhat different ruling than the Eighth and Ninth Circuits, the Second Circuit nonetheless squarely placed itself in the middle of the controversy.

Moreover, as a practical matter, the Second Circuit rule will have the same effect as a rule requiring a showing of wilfulness in every case. Indeed, as this Court noted in *Taylor*, it can almost always be argued that prejudice to the prosecution can at least be minimized by granting the prosecution a

continuance. 484 U.S. at 414. In almost all cases, an adjournment will at least give the prosecution an opportunity to investigate the witness, even though this may not eliminate the prejudice entirely. And very often it will be difficult to prove that any prejudice accrued, much less that it could not be minimized. Thus, the Second Circuit holding in this case will effectively impose a finding of wilfulness as a pre-requisite to preclusion in virtually all cases.[5]

Thus, the Second Circuit's ruling on the necessity of a showing of wilfulness as a predicate to preclusion in so many cases aligns the Second Circuit squarely against those courts that have read *Taylor* to require a case-by-case balancing or weighing test. Furthermore, the Second Circuit's requirement threatens the application of the prevailing rules in the state courts within its jurisdiction, which have no such requirement,

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[5] The application of the Second Circuit's rule in this case demonstrates that the proviso that the court imposed will not serve to limit the application of the wilfulness requirement in any meaningful way. In this case, the prosecution had a strong argument that counsel's failure to give notice created irremediable prejudice. At the time counsel served notice, the alibi witness, Yamagata, had pending drug indictments on which he was represented by the same attorney who represented Noble. This, of course, made any meaningful communication with Yamagata virtually impossible at that time. Had counsel, however, served a timely notice of alibi, within a few weeks after arraignment, Yamagata would not yet have been charged in his drug matters and would not yet have been represented by counsel. Nevertheless, the Second Circuit held that prejudice could be "minimized" by an adjournment to allow the prosecution to investigate, and that therefore the prosecution was required to establish that defendant acted wilfully. If, as the Second Circuit held, the wilfulness requirement applies here, then it would indeed apply in virtually all cases.

and adds to the growing nationwide controversy that only this Court can resolve.

Moreover, the controversy over this issue presents a particularly pressing need for resolution for additional reasons. The subject matter of the controversy is one of critical concern to all parties in the criminal justice system and, of course, to this Court as well. It affects one of the most fundamental rights of the defendant – the defendant's right to present relevant evidence – and bears directly on the truth-seeking function of the trial. It also directly affects the states' ability to ensure the accuracy and fairness of the trial by requiring full pre-trial discovery and eliminating surprise. And this Court has, in fact, specifically emphasized in many cases both its concern for the protection of a defendant's right to present a defense, and the substantial value of reciprocal discovery provisions. *Michigan v. Lucas*, 500 U.S. 145, 149 (1991); *Taylor*, 484 U.S. at 410-11, 414-18; *Wardius v. Oregon*, 412 U.S. 470, 474 (1973); *Williams v. Florida*, 399 U.S. 78, 85 (1970).

Furthermore, in light of the significance of the issue to all parties, the disparity in treatment in different jurisdictions is all the more disturbing. If, in fact, wilfulness is a pre-requisite to preclusion, then jurisdictions allowing preclusion on lesser grounds are unjustifiably distorting the truth-seeking process and permitting the conviction of possibly innocent defendants. If wilfulness is not a predicate to preclusion, then many state and federal convictions will be placed in jeopardy due to erroneous post-trial determinations as to the propriety of orders of preclusion that were issued to vindicate compelling state interests. Neither result is justifiable.

Finally, as the divergent holdings of the cases cited above make clear, this is an issue that cannot be resolved in the absence of further guidance from this Court. Nor will the issue

recede from view or diminish in importance. Indeed, in the past year and one-half alone, the Tenth and Second Circuits have issued decisions falling on different sides of the issue, as have several courts of last resort. This promises further divisiveness in the future and makes the need for review all the more pressing.

II. The Issue Presented by This Case is of One of Broad National Significance in that It Affects the Preclusion of Defense Witness Testimony under the Reciprocal Discovery Provisions of Over Forty States and the Federal Rules of Criminal Procedure.

The potential reach of a decision in this case extends well beyond what can be gleaned from the federal circuit courts and state courts of last resort that have directly considered the issue. The full breadth of the issue, and its nationwide significance, are demonstrated by the pervasiveness and variety of reciprocal discovery rules throughout the states and under the Federal Rules of Criminal Procedure.

Notice of alibi rules such as the ones at issue in the case are now in force in over forty states. *See* Alaska Crim. R. 16(c)(5) (2001); Ariz. R. Crim. Proc. 15.2(b), 15.7(4) (2001); Colo. Rev. Stat. § 16-7-102 (2000); Colo. R. Crim. Proc. 16(II)(d), (III)(g) (2001); Conn. Sup. Ct. Rules § 40-21 (2001); Fla. R. Crim. Proc. 3.200 (2001); Code Ga. Off Ann. 17-16-5 (2001); Hawaii R. of Penal Proc. 12.1 (2001); Idaho Code 19-519 (2000); Ill. Sup. Ct. R. 413 (2000); Indiana Code 35-36-4.1 and 4.3 (2000); Iowa R. of Crim. Proc. 10(11) (2001); Kansas Stat. 22-3218, 38-1623 (2000); La C.Cr. Proc. Art. 727 (2001); Maine R. of Crim. Proc. 16A(B)(3) (2000); Md. Rule 4-263(d)(3) (2001); Mass. R. Crim. Proc. 14(b)(1) (2000); Mich. Stat. Ann. 28.0443(20)(1), 28.1043(20) (2000); Minn. R. Crim. Proc. 9.02(3)(c) (2000); Miss. U.R.C.C.C. 9.05 (2001);

Missouri Sup. Ct. R. 25.05(A)(5) (2001); Mont. Code Ann. 46-15-323, 46-15-329(4) (2000); R.R.S. Neb. 29-1927 (2001); Nev. Rev. Stat. §174.233 (2000); N.H. Super. Ct. R. 100 (2000); N.J. Court R. 3:12-2 (2000); N.M. Dist. Ct. R. Crim. Proc. 5-508 (2000); N.Y. Crim. Proc. L. § 250.20 (2001); N.D. R. of Crim. Proc. 12.1 (2001); Ohio R. Crim. Proc. 12.1 (2001); Oregon Rev. Stat. 135.455 (1999); Pa. R. Crim. Proc. 305(c)(1) (2000); S.C. R. Crim. Proc. 5(e) (1999); S.D. Cod. Laws 23A-9-1 (2001); Tenn. R. Crim. Proc. 12.1 (2001); Utah C. Crim. Proc. 77-14-2 (2000); Vt. R. Crim. Proc. 12.1 (2001); Va. Sup. Ct. R. 3A:11(c)(2) (2000); Wash. Cr. R. 4.7(b)(xii) (1999); W.Va. R. Crim. Proc. 12.1 (1999); Wis. Stat. 971.23(8) (2000); Wyoming R. Crim. Proc. 12.1 (2001); *see also* 34 L.R.P.A. Ap. 2 R 74; R.C.M. 701(b)(2). Almost all of these provisions expressly authorize preclusion as a remedy, and none of them require, by their terms, a finding that counsel acted wilfully in order to impose such a remedy.

Similarly, the Federal Rules of Criminal Procedure also impose an obligation on defendants to serve notice of an alibi defense. F.R.Cr.P. 12.1. That rule, which is virtually identical to the New York statute in its requirements, expressly authorizes preclusion and, as demonstrated above, has frequently been used to preclude alibi witnesses without a prior finding of wilfulness. *See United States v. Pearson*, 159 F.3d at 483-84; *United States v. Davis*, 40 F.3d at 1075-76.

Moreover, alibi notice rules are but one small category of reciprocal discovery provisions that are now commonplace nationwide. The Federal Rules of Criminal Procedure, for example, require not only notice of alibi defenses, but also notice of the use of an insanity defense and the use of a defense based upon public authority. *See* F.R.Cr.P. 12.2, 12.3. The Federal Rules also provide for pre-trial disclosure of documents and tangible objects that the defense intends to introduce at trial,

reports of examinations and tests by defense witnesses, and notice of the intent to rely on expert testimony. F.R.Cr.P. 16(b). All of these provisions expressly authorize preclusion of defense testimony as a remedy for non-compliance, and all have been interpreted since *Taylor* to permit preclusion without a prior finding of wilfulness. *See United States v. Johnson*, 219 F.3d 349, 358 (4th Cir.) (Rule 16), *cert. denied*, 121 S.Ct. 593 (2000); *United States v. Word*, 129 F.3d 1209, 1212 (11th Cir. 1997) (Rule 12.2); *United States v. Nash*, 115 F.3d 1431, 1439-40 (9th Cir. 1997) (Rule 16); *United States v. Seeright*, 978 F.2d 842, 848-49 (4th Cir. 1992) (Rule 12.3); *United States v. Cervone*, 907 F2d 332, 345-47 (2d Cir. 1990) (Rule 12.2).

State jurisdictions too have enacted a vast array of reciprocal discovery provisions. Almost all states have provisions like the federal rule requiring the defendant to give advance notice if he intends to rely upon the defense of insanity. Wayne R. LaFave, Jerold H. Israel, and Nancy J. King, *Criminal Procedure* § 20.5(c) (1999). These provisions generally apply broadly to require notice of any form of psychiatric defense. LaFave, Israel, and King, § 20.5(d); *see People v. Almonor*, 93 N.Y.2d at 578-81, 693 N.Y.S.2d at 866-68, 715 N.E.2d at 1058-61. Roughly half the states also authorize court-ordered disclosure of the names and addresses of all the witnesses that the defendant intends to call at trial. LaFave, Israel, and King at §20.5(e); *see, e.g.*, Cal. Penal Code 1054.3 (2001); Fla. R. Crim. Proc. 3.220(d)(1)(A) (1999). And almost all jurisdictions with general discovery provisions in criminal cases authorize pre-trial discovery of documents and tangible objects that the defense intends to introduce at trial, as well as pre-trial discovery of reports and results of medical examinations, scientific tests, and experiments performed by defense witnesses. LaFave, Israel and King, at §20.5(g) and (h); *see, e.g.*, Conn.Super.Ct.R. 40-26(1) (1999); N.Y.Crim.Pro.L. §240.30 (2001). Other reciprocal discovery provisions include discovery

of prior written or recorded statements of defense witnesses, LaFave, Israel and King, at §20.5(f); *see, e.g.*, N.Y.Crim.Pro.L. §§ 240.44, 240.45(2); Fla.R.Crim.Pro. 3.220(b)(1)(B)(i), and provisions requiring notice of specific defenses other than alibi and insanity, LaFave, King, and Israel at §20.5(d); *see, e.g.*, N.Y. Crim. Proc. L. § 250.30 (2001); Ill.Sup.Ct.R. 413(d).

These many and varied reciprocal discovery provisions are invoked on an almost daily basis nationwide, and routinely present trial courts with the question of whether to preclude testimony for non-compliance. In light of the conflicting case law, these courts must decide whether a finding of wilfulness is a pre-requisite to preclusion in some or all cases. But trial courts cannot reliably resolve this question under the current state of the law. For this reason, and because ensuring that these many state and federal reciprocal discovery provisions are applied in a constitutional manner is of the utmost importance, this Court should grant certiorari.

III. The Second Circuit's Rule Is Inconsistent with *Taylor v. Illinois* and Fails to Accord Consideration to Relevant, and Indeed Critical, Concerns in Determining the Propriety of Preclusion.

The rules adopted by the Second Circuit and the other circuit courts requiring a showing of wilful non-compliance for preclusion cannot be squared with this Court's decision in *Taylor v. Illinois*. In that case, this Court specifically eschewed any categorical rule for determining the validity of an order of preclusion for a defendant's failure to comply with discovery obligations, and instead adopted a balancing test in which competing considerations would be evaluated and weighed against each other. The Second Circuit's rule imposing a showing of wilfulness as a pre-requisite to preclusion in virtually all cases is inconsistent with this analysis, and fails to accord

sufficient consideration, indeed any consideration, to matters that are not only relevant, but essential, in the determination of whether preclusion is appropriate.

In upholding the preclusion sanction in *Taylor*, this Court did not impose wilfulness as a pre-requisite to preclusion in all or any defined category of cases. Indeed, it held that "it is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." 484 U.S. at 414. Instead, it identified several considerations that must "weigh in the balance," including "the integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process." *Id.* at 414-415. As an example of the balancing that the Court envisioned, the Court cited to *Fendler v. Goldsmith*, 728 F.2d 1181, 1188-90 (9th Cir. 1983), and specifically noted that the court in that case gave consideration to multiple factors, including "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise and prejudice, and whether the violation was wilful." *Id.* at 415 n.19. The *Taylor* Court thus unquestionably contemplated that lower courts would apply a balancing test, taking all relevant considerations into account, to "guide the exercise of [the trial court's] discretion" in the individual case. *Id.* at 414.

The Second Circuit, however, has created a categorical rule, which it has imposed on the states, requiring a showing of wilfulness as a pre-requisite to preclusion in almost all cases. According to the Second Circuit, wilfulness is required whenever prejudice to the prosecution can be "minimized" by other means. This holding is objectionable, and defies *Taylor*,

in many respects. First, and most obviously, it imposes a pre-requisite to preclusion in an entire category of cases when this Court envisioned no such categorical rule. Like the rules in other circuits requiring a showing of wilfulness, the Second Circuit's categorical rule cannot be harmonized with this Court's concern that the many competing considerations be carefully weighed.

Second, as noted above, while purporting to limit the scope of the wilfulness requirement, the Second Circuit's rule in fact extends the requirement to almost all, if not all, cases. As this Court noted in *Taylor*, prejudice to the prosecution can always be "minimized" by granting an adjournment to allow investigation or by lesser means than preclusion. *Id.* at 413. Moreover, the *Taylor* Court specifically upheld preclusion despite the availability of such lesser remedies for minimizing prejudice, noting that while these remedies are always available, they are often not the most effective remedies. Thus, the Second Circuit's justification for imposing a requirement of wilfulness on the basis of the availability of such remedies is also inconsistent with *Taylor*.

Third, the Second Circuit rule fails to acknowledge that even when alternative remedies exist to "minimize" prejudice, some prejudice may result that is irremediable. For example, in this case, at the time the defense attempted to call Yamagata, he was represented on pending cases by the same attorney as Noble. Had Noble served timely notice, however, the witness would not then have been represented by Noble's attorney and the likelihood of obtaining some statement from the witness would have been much greater. The failure to serve notice, or to even mention Yamagata as a potential witness, until the eve of trial, effectively precluded any such interview. Lasting prejudice of this type surely deserves some consideration even when other alternatives exist, as in this case, to "minimize"

prejudice.

Fourth, the Second Circuit's rule, like the absolute rules expressly requiring a showing of wilfulness in all cases, fails to recognize that there exist significant variations in culpability short of a definitive showing of wilfulness. As many courts have acknowledged, there exists a considerable difference between a few days delay in complying with a statute that requires service of a notice upon arraignment when counsel has newly entered the case, and a delay of years until the eve of trial that is unexplained or justified by a weak excuse. *See e.g., People v. Pronovost*, 773 P.2d at 558 (requiring inquiry into degree of culpability associated with failure to timely file). While a court may not be convinced that counsel or defendant acted wilfully in the latter situation, defendant and counsel are unquestionably more culpable in those circumstances than in the former scenario. There is no reason why both situations should be treated the same. Moreover, even when wilfulness cannot be definitively established, circumstances may strongly suggest that defendant or counsel was at least in part motivated by strategic considerations. Here, for example, counsel's culpability was great and strongly suggested manipulation. Counsel waited over a year and one-half after the required date for filing his notice of alibi and until the eve of trial before offering a thin reason for non-compliance. Moreover, Noble gained a significant advantage from the delay, protecting his witness from the type of pre-trial interrogation by police that resulted in two of his other witnesses making damaging pre-trial statements. Thus, even absent a definitive showing of wilfulness, the nature of counsel's conduct was undoubtedly worthy of consideration and should have, at the least, "weighed in the balance."

The Second Circuit rule also ignores other critical considerations bearing on the integrity of the process and the truth-seeking function of the trial, many of which were

specifically cited in *Taylor*. For example, while this Court emphasized in *Taylor* its concern that permitting non-compliance might facilitate the introduction of perjured testimony, the Second Circuit's rule requires no inquiry on this account. Indeed, in this case, various circumstances suggested that the precluded testimony was false, including: the truly eleventh-hour disclosure of the witness, just moments before trial; the Sheriff's inability to uncover Yamagata at the time of the crime, despite the extensive investigation at the bar, suggesting that Yamagata was not in fact present; the highly suspect and apparently false testimony of two other defense witnesses exculpating Noble who had given statements directly implicating Noble at the time of the crime; and the fact that the witness and Noble shared the same place of incarceration and attorney for an extended period of time after Noble was charged in this case but before trial. The Second Circuit's rule does not examine, however, the likelihood that perjured testimony might be admitted, despite this Court's obvious concern over this issue in *Taylor*.

Similarly, under the Second Circuit's rule, the trial court is given no authority, in determining whether to order preclusion, to consider the importance of the precluded witness's testimony in the context of other defense witnesses at trial. In this case, for example, two other witnesses testified that Noble was not one of the three men to accost the victim and one testified to Noble's presence in the bar moments before the incident when the assailants were outside descending the hill to approach the victim. And although the testimony of these witnesses was impeached, so too Yamagata would likely have been impeached by his prior crimes and his jailhouse friendship with the defendant. And his testimony could well have been even further impeached had a timely notice of alibi been filed. Moreover, the Second Circuit rule deprives the trial court of the ability to examine such considerations in ordering preclusion

even though this Court in *Taylor*, in citing *Fendler v. Goldsmith* as an example of a proper method of weighing the relevant factors, specifically noted that that court inquired into "the impact of preclusion on the evidence at trial and the outcome of the case." *Id.* at 415 n.19.

Finally, the Second Circuit's rule fails to accord sufficient discretion to the trial courts, who are in the best position to judge the relevant considerations. In *Taylor*, this Court acknowledged the discretion inherent in requiring a balancing of competing factors, and declined to set down rigid rules that might inappropriately curtail it. This discretion is critical because it is the trial judge, after all, who is the most familiar with such matters as the course of litigation to the point of trial, the practicability of conducting a last-minute investigation into an undisclosed witness, and the extent of the disruption that alternative remedies would require. Yet the Second Circuit rule, and the similar circuit rules limiting preclusion to wilful non-compliance, eliminate the trial court's discretion or severely truncate it. This too cannot be squared with *Taylor* and is harmful to a full and fair determination of the propriety of preclusion.

Thus, the Second Circuit's rule unduly limits the inquiry of the trial courts. It precludes consideration of essential matters, including some specifically identified in *Taylor v. Illinois*, and thwarts a proper consideration of the interests at stake when a defendant fails to follow legitimate state rules requiring reciprocal discovery.

CONCLUSION

Because the Second Circuit's rule contravenes *Taylor v. Illinois* in so many respects and because it is in the center of a deep and irreconcilable split of authority with nationwide implications, this Court should grant review of the Second Circuit's decision.

Respectfully submitted,

STEPHEN F. LUNGEN*
District Attorney, Sullivan County

BONNIE M. MITZNER
Assistant District Attorney

JOHN M. CASTELLANO
Of Counsel

Sullivan County District Attorney's Office
County Courthouse
Monticello, New York 12701
(845) 794-3344

**Counsel of Record for the Petitioner*

July 3, 2001